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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

KEITH ANDRE HILL,

Defendant and Appellant.

F057841

(Super. Ct. No. F09900069)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Fresno County. Gary D. Hoff, Judge.

Law Offices of Allen G. Weinberg and Allen G. Weinberg, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Senior Assistant Attorney General, Charles A. French and Craig S. Meyers, Deputy Attorneys General, for Plaintiff and Respondent.

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*Before Wiseman, A.P.J., Cornell, J., and Kane, J.

A jury convicted appellant, Keith Andrade Hill, of possession of a controlled substance (Health & Saf. Code, § 11350, subd. (a)) and offering to sell or furnish a controlled substance (Health & Saf. Code, § 11352, subd. (a)). The court placed appellant on formal probation for two years, with various terms and conditions, including, inter alia, that he pay \$360 in probation supervision costs, \$296 for the costs of preparation of the probation officer's presentence report (RPO), and \$150 for the partial cost of appellant's appointed legal representation. We refer to these probation conditions, respectively, as the probation costs condition, the RPO cost condition and attorney fees condition.

On appeal, appellant contends: (1) the court improperly ordered him to make the payments set forth above as conditions of probation and therefore those orders should be stricken, and (2) the matter should be remanded for the purpose of allowing the trial court to determine appellant's ability to pay probation supervision costs and the costs of preparation of the RPO. We will strike the challenged probation conditions, modify the judgment to provide that the order directing appellant to pay \$150 toward the cost of his legal representation be part of the judgment, and not a probation condition; and remand for further proceedings.

PROCEDURAL BACKGROUND

The RPO in the instant case contained a proposed order that stated, in relevant part: **"The following are orders of the Court, but are not conditions of probation:** [¶] Pay fees for probation supervision \$360.00, presentence report \$296.00, ... and pay attorney fees pursuant to Penal Code 987.8 as determined by the court." However, at sentencing, the court imposed each of the challenged orders as conditions of probation. Appellant argues, and the People "generally" agree, that the imposition of these orders as conditions of probation was error. We also agree.

Although a defendant who is granted probation may be ordered to pay the costs of probation supervision and preparation of probation reports, if he is financially able to do so (Pen. Code, § 1203.1b, subds. (a) & (b)),¹ payment of such costs cannot be made a condition of probation. (*People v. Hall* (2002) 103 Cal.App.4th 889, 892; *People v. Hart* (1998) 65 Cal.App.4th 902, 907 (*Hart*).) Similarly, although section 987.8 “empowers the court to order a defendant who has received legal assistance at public expense to reimburse some or all of the county’s costs” (*People v. Viray* (2005) 134 Cal.App.4th 1186, 1213), “[i]mposing reimbursement of attorney fees as a condition of probation is absolutely prohibited in California courts” (*People v. Faatilgia* (1992) 10 Cal.App.4th 1276, 1280, disapproved on another point in *People v. Flores* (2006) 30 Cal.4th 1059, 1067). Accordingly, we will strike the probation costs condition, the RPO cost condition, and attorney fees condition.

We turn now to the question of whether, as appellant contends, remand is necessary to allow the court to consider his ability to pay the costs of probation supervision and preparation of the RPO.

As indicated above, section 1203.1b permits the court to require a defendant to reimburse the costs of preparation of the presentence report and costs associated with probation supervision. However, before such reimbursement is imposed, the “court shall order the defendant to appear before the probation officer ... to make an inquiry into the ability of the defendant to pay The probation officer shall inform the defendant that the defendant is entitled to a hearing ... in which the court shall make a determination of the defendant’s ability to pay and the payment amount. The defendant must waive the right to a determination by the court of his or her ability to pay and the payment amount by a knowing and intelligent waiver.” (§ 1203.1b, subd. (a).) Here, as appellant points

¹ All further statutory references are to the Penal Code.

out and the People do not dispute, appellant was not informed of his right to a hearing as required by section 1203.1b.

In *Hart* the court held that orders directing the defendant to pay the costs of probation supervision and preparation of the presentence report were improperly imposed as probation conditions, struck the orders *as probation conditions*, and modified the judgment, making the challenged orders “simply ... order[s] at judgment.” (*Hart, supra*, 65 Cal.App.4th at p. 907.) Appellant acknowledges that “[n]ormally” such a disposition is proper, but he contends remand, rather than simply modifying the judgment is necessary here because the court failed to comply with section 1203.1b. The People counter that remand is not necessary because immediately after imposing the challenged probation conditions, the court stated: “And through participation through the County’s sliding fee schedule, they can make arrangements with you on how to pay those particular fees off.” This statement, the People contend, establishes that simply striking the orders is sufficient, notwithstanding the court’s failure to comply with statutory requirements, because at some point in the future, it will be “determined what portion of these costs, in any, appellant has the ability to pay.”

We disagree. Whatever arrangements appellant might be able to make with Fresno County as to the manner of payment, under the statute he has a right to have *the court* determine whether he has the ability to pay and, in violation of section 1203.1b, he was not informed of that right.

Under these circumstances, we deem it proper to remand this matter for compliance with the section 1203.1b. (§ 1260 [on appeal “the court ... may, if proper, remand the cause to the trial court for such further proceedings as may be just under the circumstances”]; *People v. Adams* (1990) 224 Cal.App.3d 705, 712-714 [hearings under section 1203.1b may be held at any time during probationary period].)

The order that appellant pay \$150 pursuant to section 987.8 stands on a different footing. Notice and hearing are also required under section 987.8. (§ 987.8, subd. (b)). However, as the established by the following colloquy at the sentencing hearing, appellant waived his right to a hearing:

“THE COURT: ... Since you have been represented by counsel from the public defender’s office, the Court has the ability to go back and surcharge you for certain fees to assist in paying to the extent that you can [pay] for the representation that’s been provided to you. If you are willing to waive a hearing on that issue, it would be my intention to order a nominal amount.... [¶] ... [¶] My intent would be to order that you pay \$150 for representation. Is that acceptable to you and you waive a hearing on that?

“DEFENDANT []: Yes, sir.

“THE COURT: That will be the order of the Court.”

On this record, we deem it proper to modify the judgment to provide that appellant is required to pay \$150 under section 987.8, simply as part of the judgment, and not as a condition of probation. (Cf. *Hart, supra*, 65 Cal.App.4th at p. 907.) Appellant does not argue to the contrary.

DISPOSITION

The conditions of probation that appellant pay the costs of probation supervision and the preparation of the presentence report are stricken. The trial court is directed to conduct further proceedings to determine the appropriateness and amount of probation costs under Penal Code section 1203.1b. The judgment is modified to provide that appellant pay \$150 pursuant to Penal Code section 987.8, as part of the judgment and not as a condition of probation. As modified, the judgment is affirmed.